

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION
FOR BENEFICIAL WATER USE PERMIT
NO. 21956-g41A BY KYLER RANCH

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AMENDED
FINAL ORDER

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The Final Order in this matter is hereby amended to correct a clerical error therein. The priority date of the appropriation to be evidenced by a permit in this matter is February 27, 1979 at 12:58 p.m. and not February 20 as indicated in said Final Order. Finding of Fact No. 1 is hereby amended accordingly to reflect the aforesaid filing date.

DONE this 14th day of May, 1982.

Gary Fritz
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 449 - 2872

Matt Williams
Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

CASE # 21956

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CASE # 21956

comprised of 160 acres in the SE1/4 and 140 acres in the NE1/4 of Section 21, Township 6 North, Range 4 West, all in Jefferson County. The Applicant may divert the waters provided for herein from alternate points of diversion located in the SE1/4 NE1/4 SE1/4 of Section 28, Township 6 North, Range 4 West, all in Jefferson County. The source of supply for the waters provided for herein shall be groundwater. The priority date for this permit shall be February 20, 1979, at 12:58 p.m.

This permit is subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of these rights as provided by Montana Law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

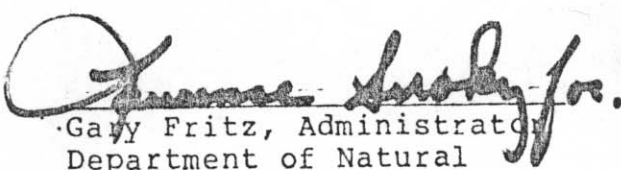
C. The Permittee shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the above-described purposes. At all times when water is not reasonably required for the purposes provided for herein, the Permittee shall cause and otherwise allow the waters to remain in the groundwater system.

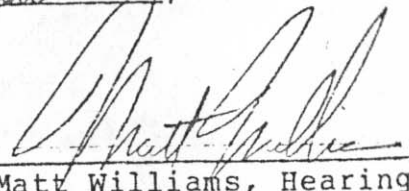
D. Permittee shall proceed with reasonable diligence in the completion of his appropriative works and actually applying the waters provided for herein to beneficial use. The Permittee shall equip the pumps at the point of diversion with a flow meter such that, in conjunction with records of electrical service, both the flow rate and the volume of water withdrawn can be calculated at any given time.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 20th day of April, 1982.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 449 - 2872


Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
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CASE # 21956

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The present application seeks 2000 gallons per minute up to 621 acre-feet per year for new sprinkler irrigation from May 15 through September 10, inclusive, of each year. The place of use is alleged to be 300 acres more or less, comprised of 140 acres in the NE1/4 and 160 acres in the SE1/4 of Section 21, Township 6 North, Range 4 West, all in Jefferson County. The source of supply is claimed to be groundwater, to be diverted from alternate points in the NE1/4 SE1/4 SE1/4 of Section 28, Township 6 North, Range 4 West, all in Jefferson County. The pertinent portions of this application were duly published for three successive weeks in the Boulder Monitor, a newspaper of general circulation printed and published in Boulder, Montana, and in the

Montana Standard, a newspaper of general circulation printed and published in Butte, Montana.

On January 23, 1980, an objection to the granting of this application was filed with the Department of Natural Resources and Conservation by the Town of Boulder. This objection alleges generally that this objector has water rights which may be adversely affected by Applicant's proposed water use. This Objector appeared at the hearing and was represented by Counsel John Connor.

On June 28, 1979, an objection to this application was filed by Tom Carey. This Objector did not appear either personally or by representative at the hearing in this matter.

On June 20, 1979, an objection was filed with the Department by George Dawson Ranch. No one appeared at the hearing representing this Objector.

On June 13, 1979, an objection to the granting of the instant application was filed with this Department by the Montana Power Company. The Montana Power Company appeared through K. Paul Stahl of Cough, Shanahan, Johnson and Waterman.

On July 11, 1979, an objection to the granting of this application was lodged with the Department by B. W. Phelan. This Objector did not appear either personally or by representative at the hearing in this matter.

On June 27, 1979, an Objection to this application was filed with this Department by the Bureau of Reclamation of the United States of America. This entity did not appear at the hearing in this matter.

EXHIBITS

The Applicant propounded four (4) exhibits, to-wit:

A-1: A map depicting Applicant's proposed place of use together with Applicant's proposed point of diversion and pipeline system.

A-2: A map depicting the ownership of properties in and about that land owned by the Kyler Ranch Co., with the location of a point of diversion depicted thereon.

A-3: Design material for Applicant's proposed sprinkler systems.

A-4: A well log for Applicant's test hole.

All of the Applicant's exhibits were received into the record.

The Department propounded a single exhibit, to-wit:

D-1: A report prepared by a Department employee relating his inspection of the proposed application herein.

This memorandum is made part of the record as it was extensively relied on in the testimony of the Department's witness.

FINDINGS OF FACT

1. The present application was duly and regularly filed with the Department of Natural Resources and Conservation on February 20, 1979 at 12:58 p.m.

2. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and it is not attempting to speculate in the water resources.

3. The waters claimed herein will be of material benefit to the Applicant by providing a source of hay and obviating the need for the purchase of the same or for the purchase of the use of pasture land.

4. The soils comprising the place of use have little water-holding or water retention capacity. The place of use of Applicant's waters will be 300 acres more or less comprised of 140 acres in the NE1/4 and 160 acres in the SE1/4 of Section 21, Township 56 North, Range 4 West all in Jefferson County.

5. The use of 2000 gallons per minute up to 621 acre-feet per year is a reasonable estimate of the quantity of water required for Applicant's purposes, and said volume will not result in the waste of the water resource.

6. The Applicant intends to use the waters claimed herein from May 15 to September 15, inclusive, of each year.

7. The Applicant's point of diversion will be wells constructed in the SE1/4 NE1/4 NE1/4 of Section 28, Township 6 North, Range 4 West, all in Jefferson County. The source of supply will be groundwater.

8. The Applicant intends to manifold the water supplied from the ultimate points of diversion together, then to convey the same to circular pivot sprinkler systems by means of an underground pipe.

9. Applicant's proposed means of diversion are customary and adequate for its intended purposes, and such means will not result in the waste of the water resource.

10. There are surplus waters available for Applicant's use in the amounts it seeks to appropriate and throughout the period during which it seeks to use the water.

11. The cone of depression resulting from the pumping of Applicant's wells will not reach the Boulder River.

12. The Boulder River is an effluent stream, contributing substantially to the groundwaters in the Boulder Valley.

13. The pumping of Applicant's wells will have an immeasurable effect, if any, on the water levels in the wells utilized by the City of Boulder.

14. There are no water permits or water reservations on the face of the record.

15. The Applicant's proposed use will not adversely affect the rights of prior appropriators.

CONCLUSIONS OF LAW

1. The priority date for the permit to be issued in this matter shall be February 27, 1979, at 12:58 p.m. This is the date and time at which the Application was duly and regularly filed with the Department of Natural Resources and Conservation. See MCA 85-2-401(2) (1981).

2. The Department of Natural Resources and Conservation is mandated to issue a new water use permit if the following conditions or criteria exist:

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

The former language contained in MCA 85-2-311 (1981) contains changes made by the 1981 legislature, which changes were expressly made applicable to pending proceedings. Although this Application antedates such changes, no prejudice accrues to any of the parties involved herein, as a close inspection of the former statute reveals that the language changes merely made explicit what was formerly implicit.

3. The Applicant must establish the aforesaid conditions or criteria by substantial credible evidence. MCA 85-2-311(7) (1981).

4. The Applicant's proposed use will be of material benefit to itself, and therefore belongs to the class of uses that are to be regarded as beneficial use. See MCA 85-2-102(2) (1981).

5. The use of 2000 gallons per minute up to 621 acre-feet per year is a reasonable estimate of the quantity of water required for Applicant's purposes. Although such a volume at first blush seems extravagant for the irrigation of 300 acres in view of the efficiency to be expected with a sprinkler irrigation system, the limited water holding capacity of the soils justifies this amount for full service alfalfa irrigation.

6. The place of use will be 300 acres more or less comprised of 40 acres in the NE1/4 and 160 acres in the SE1/4 of Section 21, Township 6 North, Range 4 West, all in Jefferson County. The points of diversion for Applicant's water will be two (2) wells located in the SE1/4 NE1/4 NE1/4 of Section 28, Township 6 North, Range 4 West, all in Jefferson County. This description is at variance with that disclosed in the application, and that found in the public notice of this matter. The latter details the placement of points of diversion immediately to the south. However, no prejudice accrues to any water user in view of the modest change in distance and in view of the evidence that said change moves the points of diversion no closer to any water user whether they be objectors to this matter or not. Therefore, the error in the notice of this matter is a harmless one.

7. There are unappropriated waters available for Applicant's use in the amount it seeks and throughout the period during which it seeks to divert and use the waters claimed herein. While the Hearings Examiner considers 2000 gallons per minute as a very optimistic flow rate in view of the transmissivity values that are probably characteristic of this aquifer and the limited extent of this aquifer that is probably capable of yielding water in appreciable quantities in this area, is by the nature of things extremely difficult to forecast the actual production without actually producing the water, and there is no reason apparent from the face of the record why the Applicant should not be allowed an opportunity to attempt to divert waters at this rate. At any event, if Applicant is not able to capture waters at the rates it contemplates, it still will be able to use its entire volume of 621 acre-feet per year merely pumping for longer periods and/or by utilizing a sprinkler system designed for higher pressures of water use. Since a water use permit merely licenses a prospective appropriator to complete his appropriation, no prejudice can accrue by recognizing a 2000 gallon per minute limit to flow production as the actual amount ultimately produced will set the limit for any certificate of water right that may be issued pursuant to this appropriation. See MCA 85-2-315 (1981).

The recharge from the Boulder River to the aquifer and the Boulder River Valley demonstrates that the waters Applicant seeks to appropriate will be surplus to the needs of any other groundwater appropriators as any amounts withdrawn will be compensated for by these surplus water accretions. It is to be noted that the aquifer is at its highest levels precisely during the periods that Applicant seeks to use the waters claimed herein.

8. There are no water reservations or water permits which Applicant's proposed use will affect.

9. Applicant's proposed use will not adversely affect the rights of other appropriators. Experiences of the City of Boulder in the operation of its own wells is instructive to what impacts may be expected by Applicant's proposed use. In the use of these wells, the city cannot detect any changes in water levels prompted by the pumping of other wells that are situated closer to the City's municipal supply than the Applicant's well. Moreover, even with an optimistic estimate of transmissivity, the Department's expert was able to identify only a four-foot draw down. This estimate assumes no recharge to the system, and by the evidence this is decidedly inaccurate.

The concerns of Montana Power Company must be given short shrift. Accepting the truth of the allegations contained in the Montana Power Company objection in this matter, there is simply no basis for finding any water deprivation to downstream surface users. The cone of

depression of Applicant's wells will mostly likely not reach the Boulder River, and therefore the Applicant's pumping cannot induce any further recharge over and above what is already occurring from that source of supply. Nor will this Hearings Examiner assume that at some far removed point downriver these same waters that are discharging from the Boulder in or about the City of Boulder will eventually augment the Boulder itself or some water course that is tributary thereto. An Applicant is not required to conduct an exhaustive geological and hydrological survey of the upper Missouri River system in order to secure a water use permit.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Proposed Order is hereby issued.

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 21956-g41E is hereby granted to Kyler Ranch, a Partnership, to appropriate 2000 gallons per minute up to 621 acre-feet per year for new sprinkler irrigation from May 15 through September 10, inclusive, of each year. The place of use will be 300 acres more or less comprised of 160 acres in the SE1/4 and 140 acres in the NE1/4 of Section 21,

Township 6 North, Range 4 West, all in Jefferson County.

The Applicant may divert the waters provided for herein to alternate points of diversion located in the SE1/4 NE1/4 NE1/4 of Section 28, Township 6 North, Range 4 West, all in Jefferson County. The source of supply for the waters provided for herein shall be groundwater. The priority date for this permit shall be February 20, 1979, at 12:58 p.m.

This permit is subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of these rights as provided by Montana Law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

C. The Permittee shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the above-described purposes. At all times when water is not reasonably required for the purposes provided for herein, the Permittee

shall cause and otherwise allow the waters to remain in the groundwater system.

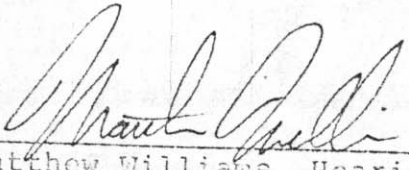
D. Permittee shall proceed with reasonable diligence in the completion of his appropriative works and actually applying the waters provided for herein to beneficial use.

The Permittee shall equip the pumps at the point of diversion with a flow meter such that, in conjunction with records of electrical service, both the flow rate and the volume of water withdrawn, can be calculated at any given time.

NOTICE

This Proposal for Decision is offered for the review of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before April 17, 1982.

DONE this 23rd day of March, 1982.


Matthew Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962